

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs March 21, 2007

**PHILLIP R. HOLDEN v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Davidson County**  
**No. 2004-A-587     Seth Norman, Judge**

---

**No. M2006-01370-CCA-R3-PC - Filed June 27, 2007**

---

The petitioner, Phillip R. Holden, appeals the Davidson County Criminal Court's denying him post-conviction relief from his 2004 conviction for possession of one-half gram or more of cocaine with the intent to sell, a Class B felony, and resulting ten-year sentence. On appeal, the petitioner contends that he received the ineffective assistance of counsel, rendering his guilty pleas unknowing and involuntary. We affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which THOMAS T. WOODALL and J. C. MCLIN, JJ., joined.

David M. Hopkins, Nashville, Tennessee, for the appellant, Phillip R. Holden.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel W. Harmon, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Dan Hamm, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The petitioner's conviction resulted from a police raid of a suspected drug house, during which the petitioner and two other men, Ronrico Bell and Harold Pointer, were arrested. The petitioner was charged with possession of one-half gram or more of cocaine with the intent to sell, T.C.A. § 39-17-417, and two counts of possession of drug paraphernalia, T.C.A. § 39-17-425. The petitioner pled guilty to the possession charge, his remaining charges were dismissed, and he was sentenced to ten years as a Range I, standard offender, to be served concurrently with a prior sentence.

At his post-conviction hearing, the petitioner testified that he did not have contact with his trial counsel between the time of his preliminary hearing and the day he entered his guilty plea, even though trial counsel said he would be in touch with the petitioner and the petitioner's daughter. The

petitioner said his only discussions with counsel involved plea negotiations. He said that on the day that he pled guilty, trial counsel told him the state agreed to his pleading guilty to the felonious possession charge and receiving a ten-year sentence. The petitioner said he told counsel that he “wasn’t going to take no time because [he] didn’t have nothing.” He said that counsel spoke with the prosecutor again but returned and told the petitioner that the state was not going to accept anything less than a ten-year sentence. The petitioner said trial counsel told him that the state was prepared to go to trial and intended to seek a life sentence against the petitioner. The petitioner said he later discovered from a person in the prison’s law library that he could not receive a life sentence on a possession charge. The petitioner said he would not have pled guilty had he known he would not have faced a life sentence. He said he also learned from his post-conviction counsel that the state’s response to discovery reflected that the petitioner’s co-defendant pled guilty and admitted that the drugs in the house belonged to him. The petitioner said he did not know about this at the time he entered his guilty plea.

The petitioner acknowledged that he was on probation at the time he was arrested and convicted in the current case. Because he violated his probation, he was ordered to serve five years in incarceration. The petitioner’s ten-year sentence in the current case was ordered to be served concurrently with the previous sentence. The petitioner acknowledged his extensive record of felony convictions, dating back to 1971. He said he did not know that the range of punishment for possession with the intent to sell was eight to thirty years. He said he did not remember what the trial judge told him at his plea hearing, but he later acknowledged, after being read an excerpt from the plea hearing transcript, that he “might have” told the judge that he understood the charges against him and their possible penalties. He also admitted that nothing in the plea agreement that he signed stated that a sentence of life was a possible punishment for his charges. The petitioner maintained that he was innocent of possession, saying that he was visiting his co-defendant’s house when the arrest occurred and that officers only found drug paraphernalia in his possession.

The petitioner’s trial counsel testified that he was appointed to represent the petitioner by the criminal court and was not appointed during the preliminary hearing. He said that the petitioner’s criminal record qualified him as a Range III, career offender and that at the time the petitioner was arrested, he was serving a six-year, one-month sentence on probation. He said that, initially, the state offered the petitioner a sentence of ten years to be served consecutively to his prior sentence but that the state later agreed to run the ten years concurrently.

Counsel testified that he learned from the assistant district attorney general that police officers had sent a confidential informant to a suspected crack house and had seen the petitioner coming and going from the house before the day of his arrest. He said he told the petitioner a conviction was likely. He summarized his discussion with the petitioner regarding the petitioner’s potential sentence as follows:

As a practical matter, I said given the fact that you’re a career offender, you run the risk if you go to trial and are convicted of getting 30 years at 60 percent, and you run the risk at the sentencing

hearing of the Judge, because you were on probation at the time this offense occurred, running that consecutively to your other sentence. At your age, that would, could result in your spending the better part of the rest of your life in jail.

He said that the “worst case scenario” would be if the petitioner were convicted of all charges, were sentenced consecutively, and received an effective sentence of more than thirty years. He believed it was unlikely that the petitioner would have received a sentence concurrent to his prior sentence, and he said that the fact that the petitioner violated his probation made it unlikely that he would have been released early on parole. He said he felt that in light of the potential outcome of a jury trial, the state’s ten-year concurrent sentence offer was “too good to turn down.” He said that the petitioner did not voice any objections to the final plea deal and that the petitioner rejected the earlier plea offer because it involved a consecutive sentence.

Counsel testified that in addition to the day of the plea hearing, he spoke briefly with the petitioner on the day of his arraignment and on two or three court-scheduled settlement days. He said he only met with the petitioner on days the petitioner was scheduled to appear in court. He said he reviewed discovery material with the petitioner and talked to the petitioner about a statement by co-defendant Bell that Bell was the one selling drugs out of the house. He said it was possible that the petitioner would have been convicted of facilitation instead of possession with the intent to sell. He said the petitioner’s likely sentence for facilitation as a career offender would have been fifteen years at sixty percent, but he did not recall whether he discussed with the petitioner the potential sentence for facilitation. Counsel could not recall how many hours he spent on the petitioner’s case. He estimated that it was more than one hour but less than ten, but he noted that the case was not set for trial at the time that it was settled.

The trial court denied the petition for post-conviction relief, finding that the petitioner’s claims were without merit. The court found that the petitioner did not demonstrate that counsel performed deficiently or that the petitioner was prejudiced by the actions of counsel. The court found that the petitioner had stated under oath that he was content with the guilty plea negotiated by counsel. The court also found that counsel’s version of events relative to the petitioner’s potential sentence if convicted as charged was “substantially more plausible than that of the petitioner.”

On appeal, the petitioner contends that the trial court erred in denying his petition. He argues that his trial counsel was ineffective and that, as a result of counsel’s ineffectiveness, his guilty plea was not knowing or voluntary. He specifically alleges that counsel did not adequately consult him before he entered his guilty plea; that counsel did not inform him of discovery, including his co-defendant’s confession; and that he only pled guilty because counsel had misinformed him that he could receive a life sentence if convicted as charged. The state contends that the trial court properly denied relief.

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the

trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457. Post-conviction relief may only be given if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103.

The petitioner contends that he received the ineffective assistance of counsel at trial and that he only pled guilty because of his trial counsel's deficiencies. Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to a general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. When a petitioner claims that the ineffective assistance of counsel resulted in a guilty plea, the petitioner must prove that counsel performed deficiently and that but for counsel's errors, the petitioner would not have entered the plea and would have insisted upon going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985). Failure to satisfy either the deficiency or prejudice prong results in the denial of relief. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The petitioner complains that his trial counsel did not adequately consult with him or review discovery with him prior to the entry of his guilty plea. The trial court accredited the testimony of counsel that counsel reviewed discovery materials provided by the state, which included a confession by co-defendant Bell, and concluded that the petitioner's best option was to negotiate a plea agreement. Counsel testified that he reviewed the discovery with the petitioner, even if he did not make a copy of the discovery for the petitioner. The trial court apparently rejected the petitioner's claim that he would not have pled guilty if he were aware of Bell's statement. We conclude that the record does not preponderate against the trial court's findings and that counsel was not deficient.

The trial court also rejected the petitioner's contention that trial counsel misinformed him that he would face a life sentence if he proceeded to trial. Instead, the court accredited counsel's testimony that, based on the petitioner's age and criminal record, he was likely to spend the rest of his life in prison if convicted. Furthermore, evidence showed that the petitioner was informed of the sentencing range for the charges against him in both the plea agreement document and by the trial court during the plea hearing. The petitioner stated at the plea hearing that he understood the possible penalties for the charges against him. The record does not preponderate against the trial court's finding that counsel did not misinform the petitioner about the possible sentences.

The petitioner has failed to show that counsel's alleged failures rendered his guilty plea unknowing and involuntary. The facts indicate that the petitioner was primarily concerned with avoiding a sentence that would run consecutively to the sentence he was already serving and that he rejected the first plea offer made to him that called for a consecutive sentence. The petitioner was informed that his criminal history and the fact that he was arrested while on probation made it likely that, if convicted by a jury, he would receive a sentence in excess of ten years concurrent to his prior sentence. The trial court found that the petitioner's guilty plea was not induced by any deficiencies of counsel, and the record does not preponderate against this finding. The trial court did not err in denying post-conviction relief.

Based on the foregoing and the record as a whole, we affirm the judgment of the trial court.

---

JOSEPH M. TIPTON, PRESIDING JUDGE